IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES et al.,
Petitioners,

v.

VAN DAVIS et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years

has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has been actively involved in a broad program of litigation across the country to enforce the rights of minorities and of women to freedom from discrimination in employment. The Lawyers' Committee provided representation before this Court in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), and has filed *amicus* briefs in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), in *Christiansburg Garment Co.* v. *EEOC*, 54 L.Ed.2d 648 (1978), and in *Monell* v. *New York City Dept. of Social Services*, 56 L.Ed.2d 611 (1978). The Lawyers' Committee has performed extensive research on the legislative history of civil rights measures enacted during the Reconstruction era, and has previously made the benefits of its research available to this Court in cases such as *Fitzpatrick*, *Monell*, *Jones* v. *Hildebrant*, 432 U.S. 183 (1977),[1] and *Hutto* v. *Finney*, 57 L.Ed.2d 522 (1978).

One of the areas of the Committee's greatest involvement has been that of employment discrimination against State and local police and fire departments. This litigation is important not just for the number of jobs it entails, but also because of the symbolic value of such employment. When members of minority groups are able to compete for these jobs and be hired, it demonstrates to society as a whole the reality of equal opportunity.

[1] After oral argument, this Court dismissed the writ of certiorari as improvidently granted, as it had become clear that Petitioner in *Jones* was not seeking damages for the injury to and killing of her son, but rather damages for deprivation of her claimed parental interest in the life of her son. 432 U.S. at 189.

The racial integration of police and fire departments is often perceived as responsible for dramatic improvements in the relations between such departments and members of minority groups, with a corresponding decline in complaints of police brutality and a corresponding improvement in the delivery of these important services.

The decision of the present case will have a strong effect upon such litigation. Many suits against local police and fire departments were brought in the period before enactment of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, which extended the coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, to State and local employment. These suits commonly challenged local testing requirements which, while unvalidated and often unrelated to the requirements of employment in police and fire departments, were routinely allowed to continue in operation despite a track record of disqualifying all but a handful of minority applicants. Many of these suits were successful, but resulted in remedial orders under which the district courts retained jurisdiction for particular purposes. Because it is rare that discriminatory purpose could be proven with respect to the adoption of a testing requirement, the relief granted in such cases may have to be dissolved if this Court were to hold that proof of discriminatory purpose is required to establish a violation of § 1981.

The decision of the present case is important for yet another reason. As the record of the instant case shows, tests for employment in police and fire departments are not given according to a regular schedule, and several years may pass between tests. The period of time between the announcement of a test and the commencement of hiring based on the test results may be only a couple of months, far less than the minimum 180-day waiting period from the filing of a Title VII charge with the

Equal Employment Opportunity Commission to the Attorney General's issuance of a Notice of Right to Sue.[2] If relief cannot be sought under § 1981 in such testing cases, hiring may have been completed by the time a Title VII case can be brought.

The parties have consented to the filing of this brief.

STATEMENT

The Complaint was filed on January 11, 1973, alleging racial discrimination against blacks and against Mexican-Americans by the Los Angeles County Fire Department. While the original Complaint is not included in the Appendix, the Second Amended Complaint, filed on April 16, 1973, alleged violations of Title VII and of 42 U.S.C. §§ 1981 and 1983 because of discrimination in recruitment "at least until 1969", and because of the use of written and oral tests, and of other practices, which had a racially disparate effect on blacks and on Mexican-Americans, but which had not been validated and which were not in fact job-related. App. 8-9. The parties stipulated facts establishing that the past hiring tests used by the Los Angeles County Fire Department had had a racially disparate effect on blacks and on Mexican-Americans, and stipulated that the County had never performed a validation study of these tests under the procedures set forth in the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607. App. 21-23.

Paragraphs 22-24 of the parties' Stipulation are central to this case. They recite that a test was administered in January 1972 to 2,414 applicants, that the highest-scoring 544 applicants were selected for oral interviews, that the oral interviews commenced on January

[2] Sec. 706(f)(1) of the Act, 42 U.S.C. § 2000e-5(f)(1).

3, 1972, that the County decided on January 8, 1972 to discontinue this procedure and to interview substantially all of the applicants with passing scores, and that the expanded interviews began on January 20, 1973. App. 24-25. There is no explanation of record for the difference of more than a year between the two sets of interviews. Given the district court's finding that the County had used its old procedure with respect to the written test "until learning that this lawsuit was about to commence", App. 39, and given that the lawsuit actually commenced on January 11, 1973, it seems evident that most or all of the stipulated 1972 dates should actually have been dates in 1973.

The district court found that the County's use of written tests was discriminatory, and found that the City had discriminatorily failed to take the necessary affirmative steps to overcome its discriminatory reputation in the black and Mexican-American communities. It upheld the County's 5′7″ height requirement for employment, and ordered affirmative hiring relief under which at least 20% of all new persons employed in firemen positions would be black, and at least 20% would be Mexican-American, until the percentage of each respective group employed as firemen should equal the percentage of that group in the general population of the County. This hiring relief was expressly based on the district court's finding that it was necessary to overcome the "presently existing effects of past discrimination", and was thus based on the County's failure to overcome the effects of its discriminatory reputation, as well as on its testing practices. App. 39-40, 42, 46.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's findings of discrimination, holding that Title VII standards of proof were applicable to claims raised under § 1981, reversed the district court on the 5′7″ height requirement, and re-

manded the hiring relief for reconsideration in light of the reversal of the height requirement. App. 52-78. The Court of Appeals subsequently granted the County's petition for rehearing in light of the decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), and withdrew its earlier opinion. In its new decision, the Court of Appeals again decided that Title VII standards of proof were applicable to § 1981 claims, and reached the same result with respect to the district court's findings. The remand of the hiring relief ordered by the district court was broadened, however, so that the district court could also consider the propriety of the hiring relief in light of the holding of the Court of Appeals that plaintiffs had no standing as individuals to challenge the 1969 and earlier tests, and that the failure to certify a class of past applicants meant that the earlier tests could not be challenged in the litigation. 566 F.2d 1334, 1337-38 (9th Cir., 1977). While the original decision of the Court of Appeals expressly refused to consider the County's failure to overcome its discriminatory reputation as a ground for relief, App. 57 note 6, the Court of Appeals deleted this statement in its decision on rehearing and this finding by the district court is apparently available as a ground for relief.

On June 19, 1978, the County's petition for certiorari was granted.

SUMMARY OF ARGUMENT

I.

This case presents a narrow but exceedingly important issue: whether racially motivated intent is necessary to establish a prima facie violation of 42 U.S.C. § 1981. In the first section of our brief, we suggest that this case may not be the appropriate vehicle for the resolution of that question. There is good reason to believe that, but for a clerical error in a stipulation, this case

could have been resolved under Title VII. Because the Court of Appeals has ordered the case remanded to the lower court on remedial questions, there will be ample opportunity for the court to ascertain whether a clerical error was made and to order relief under Title VII if appropriate. Accordingly, we urge the Court to dismiss the writ of certiorari as improvidently granted.

II.

(a) By its plain language, § 1981 is directed to the consequences, and not the motivation, of discriminatory employment practices. The similar language of Title VII was construed by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) to mean that disparate impact unjustified by business necessity is sufficient. The language of § 1981 is no less stringent. The same standard of proof should be applied to both statutes because they share the same remedial purposes and because Congress intended them to be read *in pari materia*.

(b) Adoption of a broad, rather than a restrictive standard of proof under § 1981 would better implement Congress' aims as reflected in the legislative history and is consonant with the accepted doctrine of the day that statutes were capable of growth and should be adapted to meet new situations.

The legislative history shows that Congress was concerned about facially neutral statutes that had a discriminatory impact on blacks. The Congress was aware of, and approved, the action taken by military commanders in South Carolina and Virginia to enjoin the enforcement of vagrancy laws enacted as part of the Black Codes to maintain the system of white supremacy in the South. Although neutral on their face, these statutes had their greatest impact on blacks who were often unable to purchase land or find work.

The Congressional discussion of intent centered on the penal provisions of § 2 of the Act. Without making any separate reference to civil liability, proponents of the bill maintained that the need for proof of intent in criminal prosecutions could be inferred from the fact that § 2 was a penal provision. No such implication can be drawn concerning civil redress.

Finally, limitation of the scope of § 1981 to willful acts of discrimination would be inconsistent with the broad practical purposes envisaged by Congress when it enacted the Civil Rights Act of 1866, 14 Stat. 27.

(c) This Court's decisions support the contention that disparate impact is the proper test to be applied in cases brought under § 1981. This is the clear import of *Washington* v. *Davis*, 426 U.S. 229 (1976) and was the express holding in *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948). Moreover, it is settled that § 1981 derives from the Thirteenth Amendment, and both this Court and the lower federal courts have held that intent need not be proven when suit is brought to eliminate the badges and incidents of slavery.

III.

The provisions of 42 U.S.C. § 1988 should be used to incorporate the Title VII standard of proof into § 1981 employment discrimination cases. As part of the Civil Rights Act of 1866, § 1988 was intended to augment the substantive provisions of the Act where matters unforeseen by Congress arise. In enacting Title VII, Congress has made clear that it is concerned with the consequences, and not the motivations, underlying employment practices unjustified by business necessity. Applying the Title VII standard to employment cases brought under § 1981 would carry out the intent of Congress.

ARGUMENT

I.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

Before turning to a discussion of the issues presented by this appeal, it is well to consider whether the Court should address those issues at all given the posture of this case. First, it may be wholly unnecessary to decide the difficult question of what standard of proof should be required in cases brought under § 1981. As Judge Wallace points out in his dissent, it appears that a clerical error in a stipulation may be responsible for the finding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, is unavailable to the plaintiffs as the basis for a remedy for the defendants' activities occurring after March 24, 1972. 566 F.2d at 1347 n.2.[3] Since the remedy ordered by the Court is within the scope of Title VII, no practical purpose would be served by resolving the merits of the § 1981 controversy. In fact, one might expect that, even if the petitioners prevail on the merits of their argument that the Court below applied the improper standard of proof, the respondents would argue on remand that, once the record is corrected, Title VII is an independent and adequate basis upon which to predicate liability. Given this ambiguity in the record, the proper course would be to dismiss the grant of *certiorari* concerning this part of the case as improvidently granted.

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[3] The issue concerns whether the defendants abandoned their plan to make a discriminatory use of the 1972 examination on January 8, 1972, which was before March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, which extended Title VII to State and local governmental employers, or at a date subsequent to March, 1972. The record strongly suggests that the actual date was in January 1973, shortly before the filing of suit. See discussion in Statement of Facts.

Petitioners also contend that the district court exceeded its jurisdiction in its quota hiring order. The Court of Appeals rejected this argument on the ground that such relief would have been proper under Title VII and that the court's remedial power under Section 1981 is at least as broad. 566 F.2d at 1342-43. The court remanded this aspect of the case, however, to allow the district court to reconsider its hiring order in light of the holding of the Court of Appeals that the 5′7″ height requirement for employment was invalid, and in light of the Court of Appeals' holding that respondents "lacked standing to challenge defendants' use of the 1969 examination."[4] 566 F.2d at 1343. On remand, the district court has the power to continue the existing order, to strengthen or weaken it, or to deny affirmative hiring relief altogether, in light of the decision of the Court of Appeals on standing.

Because the present status of the hiring order is uncertain, because it may well be that the district court on remand will determine that any relief granted may be entered under Title VII as well as under Section 1981, and because the remedial issues may be altered greatly by an expansion of the class to include past applicants, it is unnecessary to confront the remedial issues at this time. Dismissal of the writ of *certiorari* as improvidently granted would conserve judicial resources and obviate the need for a ruling on important questions which appears to be unnecessary to the resolution of this case.

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[4] This holding was based on the district court's failure to certify a class of past applicants. 566 F.2d at 1337. If the district court expands the class definition on remand, the remedial issues would be cast in an entirely different light. The district court's receipt of evidence of discrimination from earlier administrations of the test suggests that it thought the rights of past applicants were included in the case, and nothing of record suggests that their omission from the class definition was advertent. Now that the Court of Appeals has emphasized the consequences of the omission, the district court may choose to cure the omission rather than to cancel the remedy.

II.

THE COURT OF APPEALS PROPERLY HELD THAT A RACIALLY DISPROPORTIONATE IMPACT ALONE IS SUFFICIENT TO ESTABLISH A VIOLATION OF 42 U.S.C. § 1981

In *Washington* v. *Davis*, 426 U.S. 229 (1976), the Court held that proof of discriminatory purpose or intent is required to establish a constitutional violation under the equal protection guarantees of the Fifth and Fourteenth Amendments. 426 U.S. at 239-45. But in the course of its opinion, the Court made equally clear that Congress may predicate statutory liability for discrimination on proof of racially disproportionate impact alone. 426 U.S. at 246-48. *Cf. Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *Amicus* believes that the statutory language of 42 U.S.C. § 1981, its legislative history, the case law, and underlying public policy considerations require the conclusion that racial animus need not be proven in order to establish a *prima facie* case.

(a) The Statutory Language of 42 U.S.C. § 1981 Compels the Conclusion That Proof of Disproportionate Racial Impact or Effect Is Sufficient to Enable a Plaintiff to Establish a *Prima Facie* Case.

Resolution of the question of what standard of proof should be required in an employment discrimination suit under § 1981 is aided by the decisions of this Court construing the language of Title VII. That statute was enacted "to ensure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).[5] In *Griggs*, this Court found that "Congress

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[5] Title VII provides in pertinent part:

Sec. 703(a) It shall be an unlawful employment practice for an employer—

* * * *

(2) to limit, segregate, or classify his employees in any way

directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation", and that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432 (emphasis in original). This, the Court held, was the inexorable meaning of the language chosen by Congress:

> The objective of Congress in the enactment of title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Id.* at 429-30.

The language of § 1981 is no less rigorous than Title VII in its protection in the same right of all persons "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, . . ." 42 U.S.C. § 1981.[6]

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which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 78 Stat. 255, 42 USC § 2000e-2.

* * * *

Sec. 706(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include . . . hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate. . . .

42 U.S.C. §§ 2000e-2(a), 2000e-5(g).

[6] The full text of 42 U.S.C. § 1981 is:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[7] See footnote 5. It could be argued that the phrase "because of race" implies a casual relationship between motivation and the resultant discrimination. In *Griggs*, this Court made no mention of this phrase. Section 1981 contains no such language and flatly states that all persons shall be protected in the rights enumerated in the statute to the same extent as white citizens.

It would be anomalous to hold that Title VII does not require proof of intent despite the statutory requirement that respondents have intentionally engaged in an unlawful employment practice as

It was originally designed to uproot the institution of slavery and to eradicate its badges and incidents. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422-37 (1968); *Tillman* v. *Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431, 439 (1973). It was to ensure that all persons, white or black, would be afforded equal opportunities to secure those rights which the framers deemed fundamental to a civilized society, and which they enumerated in the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). It is the *condition* of having lesser contractual rights and opportunities than those "enjoyed by white citizens" which demonstrates a violation of the statute.

Title VII and § 1981 "augment each other", although they are not precisely coextensive in their coverage. *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 460, 461 (1975). While Congress intended these administrative and judicial remedies to operate independently of one another, they share a common goal. There is nothing in the language of § 1981 that would require, or justify, a greater measure of proof in making a *prima facie* case than is required under Title VII. In fact, proof under § 1981 should be less burdensome because it lacks the phrase "because of race" which is contained in Title VII.[7]

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that § 1 of the Civil Rights Act of 1866 was "cast in sweeping terms", *Id.* at 422, and that it should be given a "sweep as broad as its language". *Id.* at 437. Implementation of this principle requires the conclusion that, by its terms, § 1981 does not require proof of discriminatory intent.

In addition to the plain language of the statute there are substantial policy reasons that would support application of the disparate-impact test in actions brought under § 1981. As we develop more extensively hereinafter, it is clear from the legislative history that § 1981 was intended to give practical force and effect to the mandate of the Thirteenth Amendment to eradicate the badges and incidents of slavery. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 422-37. The trend of this Court's decisions has been to broaden the reach of the Thirteenth Amendment, as it did in *Jones*, by holding that racial discrimination in the sale of real estate is a badge or incident of slavery, and to accord the Reconstruction Civil Rights statutes an expansive interpretation. *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971). See Note, The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action, 90 Harv. L. Rev. 412 (1976); Kohl, The Civil Rights Act of 1866, Its Hour Came Round at Last: *Jones* v. *Alfred H. Mayer Co.*, 55 Va. L. Rev. 272 (1969).[8] Even if the Reconstruction Congress did not

a condition of relief, and to hold that § 1981 does require proof of discriminatory purpose despite the effects-oriented language of the statute.

[8] Implicit in *Griggs* v. *Duke Power Co.*, *supra*, is the fact that poor performance by blacks on standardized intelligence tests and the low percentage of blacks with high school diplomas "are linked to slavery and its pernicious after-effects on the educational opportunities available to blacks." Note, Racially Disproportionate Impact of Facially Neutral Practices—What Approach Under 42 U.S.C. Section 1981 and 1982?, 1977 Duke L.J. 1267, 1286. The standard of proof which the Court announced in *Griggs* was designed to effectuate Congress' intent that "artificial, arbitrary and unnecessary barriers to employment" be eliminated. 401 U.S. at 431. *See Gaston County* v. *United States*, 395 U.S. 285 (1969), cited by this Court in *Griggs*.

anticipate the form that badges and incidents of slavery would take in modern times, the Court should adopt a rule of proof that will effectuate the underlying intention to eradicate the incidents of slavery. *Cf. Browder* v. *United States*, 312 U.S. 335 (1941); see the discussion *infra*.

As one commentator has argued:

> [U]se of the disproportionate impact theory under sections 1981 and 1982 is supported by three related considerations. First, civil rights legislation is now recognized by the courts as being remedial in nature and thus deserving of liberal interpretation to realize the beneficient (sic) purposes underlying the statutes. Second, Title VII and sections 1981 and 1982 should be interpreted in pari materia because they have similar remedial purposes. The courts have generally given these statutes parallel interpretations in matters of substance. And finally, Congress has impliedly consented to the reading of section 1981 in pari materia with Title VII by refusing to amend Title VII in 1972 so as to make it the exclusive remedy for employment discrimination.
>
> The use of the disproportionate impact standard for sections 1981 and 1982 is permissible under the broad language of those statutes and is desirable as a method of effectuating the underlying congressional purpose.

Note, *supra*, 1977 Duke L. J. at 1286-87. (Footnotes omitted.)[9]

[9] With respect to Congress' discussion of the relationship between Title VII and § 1981, see text, *infra*, at 40-41.

(b) The Legislative History of the Civil Rights Act of 1866 Supports A Broad Reading, Unrestricted By An Intent Requirement, of the Civil Provisions of the Statute

It would be unrealistic to examine the legislative history of the Civil Rights Act of 1866 for discussions of disparate-impact analysis such as the discussion of this Court in *Griggs*.[10] There are strong indications in the legislative history of the 1866 Act, however, that a broad reading of the statute so as to prohibit both disparate-impact and intentional discrimination is more in harmony with the intent of Congress than a restriction of its reach to acts of purposeful discrimination.

Such indications are of particular importance in construing statutes of this period because a contemporaneous doctrine of statutory construction held that the words and original application of a statute did not necessarily limit its effect. Like a judicial precedent, a statute was considered as being to some extent capable of growth under the demands of a changed situation, so that it would continue to serve its original purposes. This Court recognized this doctrine of "the equity of the statute" in *United States* v. *Freeman*, 44 U.S. 556, 565 (1845), and cautioned that there should not be "an equitable construction of statutes beyond the just application of adjudicated cases." In *Stewart* v. *Kahn*, 78 U.S. 493, 504 (1871), this Court held that "severe and literal" constructions should be avoided, and continued: "A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law maker constitutes the law." *See also* Landis, "Statutes and the Sources of Law", *Harvard Legal Essays* 213 (1934). Whatever

[10] *E.g.*, *Note*, *supra*, 1977 Duke L.J. at 1280.

may be the current force of this doctrine,[11] it was undeniably accepted in the 1860's, and the 39th Congress must be considered—absent persuasive evidence in the legislative history of the 1866 Act to the contrary—to have framed the Act under the assumption that its interpretation would not be limited to the specific situations then facing Congress, but was capable of growth to meet new situations. If there is no adequate direct evidence as to an intent requirement, therefore, the inquiry must shift to the identification of the primary purpose of Congress. If the primary purpose was to secure a practical result, this would indicate an intention that the reach of the statute be capable of growth sufficient to accomplish that result. If the congressional purpose was only to ensure facial neutrality in the actions of State and local government officials, while banning the more egregious private actions as well, this limited view of the statute would support petitioners.

(1) *Direct Evidence That Congress Did Not Intend to Limit the Civil Provisions of the Statute By an Intent Requirement*

The strongest indication that Congress considered and accepted a disparate-impact standard arose in the course of debate on the effect of the statute on the "Black Codes" adopted by Southern legislatures after the end of the war, and the desire of Congress to enact into positive law in the statute the military orders disapproving those codes. Many provisions of the Black Codes were not discriminatory on their face; some went so far

[11] In his dissenting opinion in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 390 (1953), Justice Frankfurter stated:

> Statutes, even as decisions, are not to be deemed self-enclosed instances; they are to be regarded as starting points of reasoning, as means for securing coherence and for effectutating purpose.

as to guarantee blacks the right to own property.[12] The evils Congress sought to redress in relation to these codes were of two kinds: the explicit racial discrimination in some provisions of the codes, and also the racially disparate operation of certain harsh but facially neutral provisions such as the vagrancy and apprenticeship laws. These latter provisions applied to blacks and whites alike,[13] but harmed blacks to a much greater extent than whites because of the private actions of whites in refusing to sell land to blacks or to employ blacks at a fair wage.[14]

The provisions of the Virginia vagrancy law are an excellent case in point. On its face, the statute applied to both blacks and whites, and defined as vagrants the members of either race who were beggars, or who had no visible means of support, or who, "not having wherewith to maintain themselves and their families, . . . live idly and without employment, and refuse to work for the

[12] Kohl, *supra*, 55 Va.L.Rev. at 276-78. The Black Codes were collected in 1 *Senate Executive Documents* (39th Cong., 2nd Sess.) (1886) No. 6 at 170-230. See note 15 *infra*.

[13] 1 *Senate Executive Documents, supra*, No. 6 at 170-71 (Alabama, Act of December 15, 1865 concerning vagrants or vagrancy); at 180-81 (Georgia, Act of March 17, 1866 in relation to apprentices); at 181-83 (Louisiana, Act regulating labor contracts for agricultural pursuits, not then signed by the Governor); at 184-85 (Louisiana, Act of December 20, 1865 for the punishment of vagrancy); at 186 (Louisiana, Act of December 21, 1865 in relation to apprentices and indentured servants); at 218-19 (South Carolina, §§ 95-99 of the Act of December 21, 1865, relating to vagrancy); and at 229-30 (Virginia, Act of January 15, 1866 providing for the punishment of vagrants). As will be seen hereafter, the provisions of the Black Codes were discussed frequently in the debates on the 1866 Act.

[14] Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866), part II at 55, 83, 235-36, part III at 9, 22, 36, 71, and part IV at 56, 69, 82 and 117; Report of General Carl Schurz (December 1865), 1 *Senate Executive Documents*, (39th Cong., 1st Sess., 1865) No. 2 at 22, 24-25, 82; Kohl, *supra*, 55 Va.L.Rev. at 279-83.

usual and common wages given to other laborers, in the like work, in the place where they then are." Vagrants of both races were subject to arrest and to a warrant ordering them "to be employed in labor for any term not exceeding three months . . . for the best wages that can be procured . . . to be applied . . . for the use of the vagrant or his family." [15] Nine days after its enactment,

[15] The complete provisions of the Virginia Act of January 15, 1866, "An Act Providing for the Punishment of Vagrants", are:

> 1. *Be it enacted by the general assembly,* That the overseers of the poor, or other officers having charge of the poor, or the special county police, or the police of any corporation, or any one or more of such persons, shall be, and are hereby, empowered and required, on discovering any vagrant or vagrants within their respective counties or corporations, to make information thereof to any justice of the peace of their county or corporation, and to require a warrant for apprehending such vagrant or vagrants, to be brought before him or some other justice; and if upon due examination it shall appear that the person or persons are within the true description of a vagrant, as hereinafter mentioned, such justice shall, by warrant, order such vagrant or vagrants to be employed in labor for any term not exceeding three months, and by any constable of such county or corporation to be hired out for the best wages that can be procured; to be applied, except as hereafter provided, for the use of the vagrant or his family, as ordered by the justice. And if any such vagrant or vagrants shall, during such time of service, without sufficient cause, run away from the person so employing him or them, he or they shall be apprehended on the warrant of a justice, and returned to the custody of such hirer, who shall have, free of any further hire, the services of such vagrant for one month in addition to the original term of hiring; and said employer shall then have the power, if authorized by the justice, to work said vagrant confined with ball and chain; or should said hirer decline again to receive said vagrant, then said vagrant shall be taken by the officer, upon the order of the justice, to the poor or work house, if there be any such in said county or corporation; or, if authorized by the justice, to work him confined with ball and chain for the period for which he would have had to serve his late employer, had he consented to receive him again; or should there be, when said runaway vagrant is apprehended, any public work going on in said county or corporation, then said vagrant, upon the order of a justice, shall be delivered over by said officer to the superintendent of said public work, who shall, for the like last-mentioned period,

work said vagrant on said public works, confined with ball and chain, if so authorized by said justice. But if there be no poor or work house in said county or corporation, and no public work then in progress therein, then, in that event, said justice may cause said vagrant to be delivered to any person who will take charge of him, said person to have his services free of charge, except maintenance, for a like last-mentioned period; and said person so receiving said vagrant is hereby empowered, if authorized by the justice, to work said vagrant with ball and chain; or should no such person be found, then said vagrant is to be committed to the county jail, there to be confined for the like period and fed on bread and water. But the persons described as the fifth class of vagrants in the second section of this act, may be arrested without warrant by the special county or corporation police, and when so arrested shall be taken before a justice, who shall proceed to dispose of them in the mode prescribed in this section, or may at once direct them to be committed to prison for a period not exceeding three months, to be kept in close confinement and fed on bread and water.

2. The following described persons shall be liable to the penalties imposed by law upon vagrants:

First. All persons who shall unlawfully return into any county or corporation whence they have been legally removed.

Second. All person not having wherewith to maintain themselves and their families, who live idly and without employment, and refuse to work for the usual and common wages given to other laborers, in the like work, in the place where they then are.

Third. All persons who shall refuse to perform the work allotted to them by the overseers of the poor, as aforesaid.

Fourth. All persons going about from door to door, or placing themselves in streets, highways, or other roads to beg alms; and all other persons wandering abroad and begging, unless disabled or incapable of labor.

Fifth. All persons who shall come from any place without this commonwealth to any place within it, and shall be found loitering and residing therein, and shall follow no trade, labor, occupation or business, and have no visible means of subsistence, and give no reasonable account of themselves or their business in such place.

3. All costs and expenses incurred shall be paid out of the hire of such vagrant, if sufficient; and if not sufficient, the deficiency shall be paid by the county or corporation.

4. This act shall be in force from its passage.

Passed January 15, 1866.

I *Senate Executive Documents* (39th Cong., 2nd Sess., 1866), *supra*, No. 6 at 229-30.

Major General A. H. Terry, the Commander of the Department of Virginia, issued an order prohibiting the enforcement of this vagrancy law because, regardless of the intent of the legislature, private actions would make its actual operation more onerous for blacks than for whites. General Terry's order reads in pertinent part:

> In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves. By reason of these combinations wages utterly inadequate to the support of themselves and families have, in many places, become the usual and common wages of the freedmen. The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers. It places them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated—A condition which will be slavery in all but its name.
>
> It is therefore ordered that no magistrate, civil officer or other person shall in any way or manner apply or attempt to apply the provisions of said statute to any colored person in this department.
>
> By command of Major General A. H. Terry,
> Ed. W. Smith, *Assistant Adjutant General.*

McPherson, *The Political History of the United States of America During the Period of Reconstruction* (1871)

at 42. The President refused to disapprove this Order. *Id.*

This was not an isolated occurrence. In South Carolina, Major General D. E. Sickles ordered on January 17, 1866 that the only vagrancy laws that could be enforced in the State were those "applicable to free white persons", and ordered further that even these laws, made racially neutral by his order, "shall not be considered applicable to persons who are without employment, if they shall prove that they have been unable to obtain employment, after diligent efforts to do so." Order of January 17, 1866, ¶ XIII, McPherson, *supra* at 37. Orders quashing State laws were also issued by General Swayne in Alabama and by General Thomas in Mississippi.

In the debates on the 1866 Act, these Orders were frequently discussed and approved. Several members of Congress stated their view that the provisions of these Orders would be continued by the provisions of the Act, and would thus both survive the end of military government in the South and be made applicable nationally. Senator Wilson described the facially neutral Virginia vagrancy law as having been "used to make slaves of men whom we have made free," thanked General Terry for his order, and described the State laws set aside by military order as "nearly as iniquitous as the old slave codes that darkened the legislation of other days." He thought passage of the civil rights bill was required in order to bar such State laws forever. Cong. Globe, 39th Cong., 1st Sess., [hereafter, "Cong. Globe"] at 603. In the debate on initial passage, Senator Trumbull, the manager of the bill, stated that one of its purposes was to destroy all the discriminations of the Black Codes. Cong. Globe at 474. In the debate on passage of the bill over the President's veto, Senator Trumbull quoted General Terry's statement that the Virginia vagrancy law would

have the effect of "[reducing] the freedmen to a condition of servitude worse than that from which they have been emancipated", and cited the orders issued by Generals Terry and Sickles as demonstrating the existence of the evils—denied by the President—that the bill was intended to redress. Cong. Globe at 1759, 1760.

The House debate was equally clear. Rep. Cook cited the vagrancy laws and the orders of Generals Thomas, Swayne, Sickles and Terry, and continued:

> The time when these men can be protected by the military power will cease. Gentlemen are insisting that the time has come when these States should be represented in Congress and restored to their original position in the Union; and the last part of the speech of the gentleman from New Jersey [Mr. ROGERS] was devoted to a denunciation of gentlemen on this side of the House because they do not believe the time had fully come. Suppose that proposition is agreed to, and these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen. Then the question is, shall we leave the men who have been loyal during this struggle, have fought on our side, and who have aided to carry the banner of the Republic in triumph through this terrible rebellion; shall we leave them to the operation of laws denounced as tyrannical by the military powers and as practically reducing these men to the condition of slavery?
>
> It is idle to say these men will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them. . . .
>
> * * * *
>
> . . . The question is, shall we leave these men in this condition? It is idle to say we are not leaving

> them to a system of slavery. If it had not been for the acts of the military commanders, had not the laws which have already been enacted by the Legislatures of the rebel States been set aside, the negroes would all have been slaves now under the operation of their vagrant acts or other laws.
>
> I believe that this bill is a proper remedy for these evils. . . .

Cong. Globe at 1124. Rep. Thayer cited the Black Codes, and the military orders prohibiting their enforcement in Mississippi, Alabama, South Carolina, and Virginia, as demonstrating that the Thirteenth Amendment would be "of no force or effect whatever" if the bill were not enacted. Cong. Globe at 1153. Rep. Windom endorsed General Terry's order setting aside the Virginia vagrancy law, and said that the bill would accomplish the same end:

> I believe, sir, that the entire party on the other side of this Chamber indorse fully the policy of the President of the United States, who has found it necessary through his general in Virginia to override one of the laws passed by that State affecting the negro. I ask, then how they can consistently indorse that policy and at the same time declare a law of Congress is unconstitutional which does the same thing?
>
> . . . I ask if it is consistent to claim this bill as unconsitutional when gentlemen indorse the President of the United States, who overrides the laws of a State in time of peace by military order? I indorse the President in setting aside those iniquitous laws of Virginia, and I believe this bill is constitutional.

Cong. Globe at 1158. Rep. Broomall took the same position. Cong. Globe at 1263.

If Congress or the military had wanted to restrict their actions to purposeful discrimination, they could have stopped with outlawing the private combinations of employers that caused the vagrancy laws to bear more heavily on blacks than on whites. Both Congress and the military understood that they were going further, however, and prohibited the enforcement of these facially neutral laws.

Yet a further indication of the intent of Congress is provided by the discussion in debate on the requirement of intent for crimes. This Court has previously held that the scope of § 2 of the Civil Rights Act of 1866, 14 Stat. 27 [16]—the penal enforcement provision—is substantially narrower than the scope of § 1. *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 425 note 33. It is now settled that § 1 was intended to provide a civil remedy, *Jones, supra; Runyon* v. *McCrary*, 427 U.S. 160 (1976), and it was equally clear at the time.[17] Congress debated the question whether the statute required a showing of

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[16] Sec. 2 of the Civil Rights Act of 1866 has evolved into 18 U.S.C. § 242. *Jones, supra*, 392 U.S. at 424 note 32.

[17] Sec. 3 of the Act, 14 Stat. 27, clearly contemplated that civil suits be brought in State courts to enforce the rights granted by the Act—no grant of general Federal-question jurisdiction having yet been made to U.S. District and Circuit Courts—and provided jurisdiction in the U.S. Circuit Courts where such rights could not be enforced in State or local courts. The earliest application of this right of civil enforcement which *amicus* has been able to discover was in *In re Turner*, Fed.Cas.No. 14,247 (Cir.Ct., D.Md., 1867). There, Chief Justice Chase, sitting as Circuit Justice, ordered the discharge, on a writ of habeas corpus, of a black child who had been indentured as an apprentice under the terms of a Maryland law which did not provide the same terms of indenture for black apprentices as a different law provided for whites.

In the debate, Senator Hendricks objected that the bill would create a civil remedy for damages, Cong. Globe at 601, and Senator Cowan objected that § 1 would enable the U.S. courts to expand their jurisdiction. Cong. Globe at 1782-83. No one disagreed with these propositions. *See also* the remarks of Rep. Wilson, *infra* note 19.

intent, but debated this question only in reference to the narrow penal provisions of § 2. The debate was occasioned by the claim of opponents of the bill that § 2 would authorize the arrest of a State judge for following in good faith the provisions of a State constitution or of State laws which were subsequently found to be inconsistent with the bill.[18] The proponents of the legislation responded by stating that the requirement of unlawful intent could be inferred from the fact that § 2 was a penal provision, and that there was therefore no need to add an intent requirement to the penal provisions of the statute.[19] If any express provision of the statute had been considered by its proponents to require intent, they would surely have pointed it out rather than rely on an argument by implication, when the argument relied on would clearly be inapplicable to any provision but § 2.

[18] *E.g.*, Cong. Globe at 475 (remarks of Senator Cowan).

[19] "[I]t requires a union of act and intention to commit a crime." Cong. Globe at 475 (remarks of Senator Trumbull); "I suppose the essence of all crimes consists in the intention, the purpose. In the trial of criminal cases, we inquire into the *animus* with which the act was done by the accused . . . ." Cong. Globe at 502 (Discussion of culpability for treason) (remarks of Senator Howard); "Sir, what is a crime? It is a violation of some public law, to constitute which there must be an act and a vicious will in doing the act . . . and a judge who acted innocently, and not viciously or oppressively, would never be convicted under this act." Cong. Globe at 1758 (remarks of Senator Trumbull). Rep. Wilson stated in the House that "there are two legal modes of meeting any and every willful deprivation of these rights: one by action for damages at common law in the courts, which, however, will not lie against judicial officers; and the other by making it a penal offense, as the second section of this bill does . . . ." Cong. Globe at 1836. Nothing in his remarks indicates that he intended to limit civil remedies under the statute to cases of willful violations, or that he ever addressed the precise reach of the civil provisions of the bill, as distinct from the criminal provisions. No other Representative or Senator discussed a limitation of the civil provisions in a manner corresponding to the limitation of the criminal provisions.

(2) *Indirect Evidence That Congress Did Not Intend to Limit the Civil Provisions of the Statute by an Intent Requirement*

There is strong evidence that the framers of the 1866 Act wanted the rights they declared to be capable of growth, so as to continue to accomplish their purposes under the demands of different situations. Senator Trumbull openly admitted that he did not know the exact dividing line between slavery and the liberty protected by the Thirteenth Amendment, but that he wanted to give the greatest possible practical effect to the policy declared in the Thirteenth Amendment:

> Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. In my judgment, Congress has this authority. It is difficult, perhaps, to define accurately what slavery is and what liberty is. . . .

Cong. Globe at 474. He went on to state that "it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins," but that the Black Codes passed that dividing line wherever it was. Cong. Globe at 475. Time and again, the bill's proponents stressed that their aim was "practical", geared to a particular result. Senator Trumbull stated that the bill would secure "freedom in fact". Cong. Globe at 476. Rep. Thayer stated that the bill was to give the Thirteenth Amendment:

> . . . practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. It is to carry to its legitimate and just result the great humane revolution to which I have referred. . . . The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have

the benefit of this great charter of liberty given to them by the American people.

* * * *

For one, sir, I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee. . . .

Cong. Globe at 1151. He continued:

The bill under consideration is intended only to carry into practical effect the amendment of the Constitution. Its object is to declare not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed; not only that that feature of slavery shall be abolished which permitted the purchase and sale of men, of women and of little children as slaves, but that all features of slavery which are oppressive in their character, which extinguish the rights of free ctizens, and which unlawfully control their liberty, shall be abolished and destroyed forever.

To put any other construction upon this great amendment of the Constitution is to deprive it of its vital force, of its effective value. It is to cheat the world by sounding phrases; and while you pretend to give liberty to those who were in bondage, to leave them in reality in a condition of modified slavery, subject to the old injustice and the old tyranny which characterized their former unhappy condition.

Cong. Globe at 1152.

Rep. Windom stated that the civil rights bill would "give practical effect to the principles of the Declaration of Independence," and stated that:

It merely provides safeguards to shield them from wrong and outrage, and to protect them in the enjoyment of that lowest right of human nature, the

right to exist. Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.

Who can deny them this? To do so would be to repudiate utterly the pledges we made in the day of our sore trial, and would justly merit the scorn and contempt of mankind. We know, and the whole world knows, that when in the hour of our extremity we called upon the black race to aid us, we promised them not liberty only, but all that that word liberty implies. . . .

Cong. Globe at 1159.

To restrict the scope of § 1981 to purposeful acts of discrimination would be simply inconsistent with the broad practical purposes of Congress in enacting the 1866 Act. An intent requirement can readily be harmonized with the goal of ensuring the neutrality of government processes, towards which the Fourteenth Amendment's equal protection clause was later directed. However, the Civil Rights Act of 1866 was directed towards achieving the *practical result* of equality, not towards ensuring a neutral process. The purpose of the Act would be thwarted, and the equity of the statute violated, if it were construed in the manner suggested by petitioners.

(c) Judicial Precedent Supports *Amicus'* Position That Discriminatory Intent Need Not Be Proven to Establish a Statutory Violation Under 42 U.S.C. § 1981.

(1) This Court's Cases Applying § 1981 Do Not Require Intent to Be Proven

A holding that proof of racial motivation is not required to establish a *prima facie* case under § 1981 would be consistent with this Court's previous interpretations of § 1981. In fact, *amicus* believes that Part III

of the opinion in *Washington* v. *Davis* is dispositive of this question.[20] In *Washington* the Court noted that the defendants in the district court "appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." 426 U.S. at 249 (footnote omitted). Part II of the Court's opinion was based on the fact that racially discriminatory purpose had not been shown and that therefore, under constitutional standards, the defendants were not required to show that the test there involved—"Test 21"—was job related. Accordingly, there would have been no need for the Court to go on—as it did in Part III of its opinion—to reach the question whether Test 21 had been shown to be job related, unless it were assumed—as the Court obviously did assume—that discriminatory purpose need not be shown under the statutes, including § 1981, there involved. *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F.Supp. 873 (C.D. Cal. 1976).[21]

[20] The respondents' complaint in *Washington* v. *Davis* alleged violations of the Fifth Amendment, § 1981 and D.C. Code § 1-320. 426 U.S. at 233. Respondents moved for summary judgment solely on the constitutional claim. The petitioners and the Federal parties filed cross-motions for summary judgment "asserting that respondents were entitled to relief on neither constitutional nor statutory grounds." 426 U.S. at 234 (footnote omitted). In Part III of its opinion, this Court held "that the Court of Appeals should have affirmed the judgment of the District Court granting the motions for summary judgment filed by petitioners and the Federal parties. Respondents were entitled to relief on neither constitutional nor statutory grounds." 426 U.S. at 248. The petitioners consistently maintained that they had complied with "all applicable statutory as well as constitutional standards." 426 U.S. at 234 n. 4 and 249. Thus the holding of Part III must relate to § 1981 and D.C. Code § 1-320. See 426 U.S. at 255 (Stevens, J., concurring).

[21] The petitioners represent in their brief that in *Jones* v. *Alfred H. Mayer Co., supra*, this Court held that discriminatory intent is required under 42 U.S.C. § 1982. Brief at 20-22. Arguing from this premise, they contend that § 1981 must be construed accordingly because of the historical relationship between the two sections. But

This reading of *Washington* v. *Davis* is clearly consistent with this Court's use of the disparate-impact test in *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948). There, the Court applied § 16 of the Enforcement Act of 1870, now codified as § 1981, to "protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color." 334 U.S. at 419-20. In reaching its decision, the Court found it unnecessary to resolve the question whether the legislation in question—a California statute barring aliens "ineligible for citizenship" from engaging in commercial fishing in California's coastal waters—was a legitimate fish conservation measure, or was an anti-Japanese measure motivated by racial antagonism. 334 U.S. at 418-19.[22] The Court held that, regardless of motive, the combined effects of § 1981 and the Fourteenth Amendment "embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." *Id.* at 420.

In *Takahashi*, the Court made reference to the fact that § 1981 rests "in part" on the Fourteenth Amendment. *Id.* at 420. Subsequent decisions re-affirmed that the Congress, in re-enacting the Civil Rights Act in 1870, did not renounce its Thirteenth Amendment

Jones does not stand for the proposition asserted. The Court's use of the phrase "racially motivated deprivation" occurs only in the context of characterizing the arguments advanced by the parties —arguments that were concerned solely with the question whether § 1982 reaches purely private discrimination. 392 U.S. at 421-22, 425-26. The Court's discussion is descriptive of these arguments only, and does not even rise to the level of *dicta*.

[22] Thus, *Takahashi* involves a principle different from that in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), cited by the Court in *Washington* v. *Davis*, 426 U.S. at 241. *Takahashi* was not a case in which intent could be inferred from discriminatory application of a statute otherwise neutral on its face. *Takahashi*, 334 U.S. at 418 (citing *Yick Wo*).

origins. Although the petitioners seek to trivialize the inquiry into the origins of § 1981 as an "interesting excursion into the realm of legislative genealogy" (Brief at 18), *amicus* believes that it is of great importance in determining the standard of proof in § 1981 cases. The following discussion shows that the Thirteenth Amendment was enacted specifically to eliminate the "badges and incidents" of slavery. Unlike constitutional violations under the Fourteenth Amendment, motivation is irrelevant when it comes to the destruction of the institution of slavery and its lingering manifestations.

(2) *Racially Discriminatory Motivation Need Not Be Shown to Establish Violations of the Thirteenth Amendment*

The petitioners argue at length that § 1981 was essentially intended as an equal protection measure (Brief at 18-23), and stress that the statute was re-enacted as part of the Civil Rights Act of 1870, "which was designed to implement the 14th Amendment." It is clear that acceptance of the notion that § 1981 is a creature of the Fourteenth Amendment is indispensable to their argument that the test announced in *Washington* v. *Davis* be adopted here. But it is now well settled that Congress did not intend to repeal § 1 of the 1866 Act when it enacted § 16 of the 1870 Act pursuant to the Fourteenth Amendment. *Runyon* v. *McCrary*, 427 U.S. at 168 n.8, 170-72. This reaffirmation that § 1981 has its roots in the Thirteenth Amendment proved critical in determining whether a right of action could be maintained against a private party under § 1981, because the Fourteenth Amendment proscribes only discriminatory actions taken under color of State law. *Johnson* v. *Railway Express Co.*, *supra*; *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. at 439-40; *cf. Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 424-30. By the same

reasoning, the ruling in *Washington* v. *Davis*, *supra*, that racial motivation is an essential element of proof under the Fourteenth Amendment does not dictate the same result under § 1981.

In *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), this Court observed that "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources." *Id.* at 423, quoting from *Monroe* v. *Pape*, 365 U.S. 167, 205-206 (1961) (Frankfurter, J. concurring and dissenting). *Carter* held that the Thirteenth Amendment has a different, and more extensive, reach than the Fourteenth Amendment. *Id.* at 423; *see Clyatt* v. *United States*, 197 U.S. 207, 217 (1905). In discussing § 1982, this Court held in *Carter* that, "As its text reveals, the Thirteenth Amendment 'is not a mere prohibition of state laws establishing or upholding slavery, but an *absolute declaration* that slavery or involuntary servitude shall not exist in any part of the United States.'" 409 U.S. at 421-22 (citations omitted; emphasis supplied). Section 1982, the Court concluded, was an "'absolute' bar to *all* such discrimination, private as well as public . . . ." *Id.* at 422 (emphasis in original).

This, of course, does not mean that, where Congress intends that invidiously discriminatory motivation should be an element of the offense, the Thirteenth Amendment forbids it. *See, e.g., Griffin* v. *Breckenridge*, *supra*, (42 U.S.C. § 1985(3)).[23] But it is equally clear that Congress has the power under the Thirteenth Amendment to determine the "badges and incidents" of slavery, and the authority to "translate that determination into effective legislation." 403 U.S. at 105; *United States* v.

[23] 42 U.S.C. § 1985(3) authorizes a suit for damages for conspiracies to interfere with civil rights. Wrongful intent has traditionally been regarded as an element of conspiracy because the very nature of a conspiracy demands intentional involvement.

Hunter, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972). Thus, in the peonage cases, this Court has ruled consistently that discriminatory intent need not be shown in order to establish a violation under the Thirteenth Amendment and its enforcing legislation.

A case in point is *Bailey* v. *Alabama*, 219 U.S. 219 (1911), striking down, under the Thirteenth Amendment and implementing legislation, a statute, neutral on its face, which imposed criminal penalties on persons who accepted money from an employer and then failed to fulfill the employment contract. In holding the State statute unconstitutional, the Court said:

> Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question. *Henderson* v. *New York* [*Henderson* v. *Wickham*], 92 U.S. p. 268, 23 L.Ed. 547), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; . . . .

219 U.S. at 244-45. *See also Pollock* v. *Williams*, 322 U.S. 4, 25 (1944); *Taylor* v. *Georgia*, 315 U.S. 25, 29 (1942); *Clyatt* v. *United States*, 197 U.S. 207, 216 (1905) ("this amendment denounces a status or condition, irrespective of the manner or authority by which it is created"); *Anderson* v. *Ellington*, 300 F.Supp. 789 (M.D. Tenn. 1969) (three-judge court).

More recent cases confirm that the provisions of the 1866 Civil Rights Act which were enacted to implement the Thirteenth Amendment do more than forbid *intentional* discrimination. In *Clark* v. *Universal Builders*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), § 1982 was held to forbid a practice whereby housing developers would charge higher prices to black purchasers of housing in black parts of the city than were charged to white purchasers of similar housing in white areas of the city, where segregated housing patterns were the result

of racial prejudice. The Court held that, even though the defendant developers were not motivated by a racially discriminatory purpose, § 1982 prohibits the exploitation of "a situation created by socio-economic forces tainted by racial discrimination." 501 F.2d at 330. *See also, Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 98 S.Ct. 752 (1978).

Most recently, in *Rhode Island Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, 450 F.Supp. 338 (D.R.I. 1978), the court extensively discussed the Thirteenth Amendment in considering the constitutionality of the 10% minority business enterprise requirement of the Public Works Employment Act. *Id.* at 360-67. From its examination of the "unique historical relationship of that Amendment to race," 450 F.Supp. at 363, the court concluded that,

> Section 1981 assures not just freedom from overt discrimination with invidious intent but also protects against an inequality of results, for under its Thirteenth Amendment power, Congress created a provision which, to use the Supreme Court's words from another context, outlaws "sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281 (1939) (Fifteenth Amendment.)

As the foregoing cases illustrate, the courts, including the Supreme Court, have consistently recognized that the legislation passed by Congress to enforce the Thirteenth Amendment does not require a showing of discriminatory motivation unless Congress has expressly stated otherwise. *See, e.g.*, 42 U.S.C. § 1985(3).

Petitioners contend that adoption of the *Griggs* standard in § 1981 cases involving employment discrimination

would undercut *Washington* v. *Davis* and the administrative procedures supplied by Title VII. (Brief at 39.)

The first point, that adoption of the *Griggs* standard would undercut *Washington* v. *Davis*, is not well taken. *Washington* v. *Davis* announces a constitutional rule. The issue here is what standard should be applied to a statutory claim. The Court has already applied a less strict standard to claims of governmental discrimination under Title VII in accordance with Congress' intent. *Griggs* v. *Duke Power Co., supra.* Fullfillment of congressional intent, as long as it is within the legislative power, cannot be said to undercut the constitution.

A complete answer to the second argument is found in *Johnson* v. *Railway Express Co., supra*, where this Court observed that the possible undesirable effects on the administrative procedure "are the natural effects of the choice Congress made available to the claimant by its conferring upon him independent administrative and judicial remedies." 421 U.S. at 461.[24] Imposition of a higher burden of proof in § 1981 cases as compared with Title VII would in fact result in a judicial "preference for one [remedy] over the other", precisely what this Court declined to do in *Johnson. Ibid.*

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[24] Similar arguments were made and rejected in *Jones* v. *Alfred H. Mayer, Co., supra*, and *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969). In *Sullivan*, the Court said:

> We noted in *Jones* v. *Mayer Co.*, that the Fair Housing Title of the Civil Rights Act of 1968, 82 Stat. 81, in no way impaired the sanction of § 1982. 392 U.S., at 413-417, 20 L.Ed.2d at 1192-1194. What we said there is adequate to dispose of the suggestion that the public accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided by the 1964 Act is not at war with survival of the principles embodied in § 1982.

396 U.S. at 237.

III.

42 U.S.C. § 1988 PROVIDES A MECHANISM BY WHICH TO APPLY THE DISPARATE-IMPACT STANDARD OF TITLE VII TO EMPLOYMENT DISCRIMINATION CASES BROUGHT UNDER § 1981

Petitioners have argued that, irrespective of its constitutional origins, § 1981 is basically an equal protection provision. They repeat the concern, voiced by this Court in *Washington* v. *Davis*, that adoption of the racially disproportionate impact standard might call into question the validity of a broad range of legislation.[25] Whatever force the petitioners' argument might have, it is necessarily directed to the "equal benefit" clause of § 1981. That clause, of course, is not involved in this suit. The "equal benefit" clause has been rarely utilized and its scope is uncertain. However, that clause, as well as the "like punishment" clause, plainly embraces separate and distinct rights than the others specifically enumerated in § 1981, and may embody different considerations. *Mahone* v. *Waddle*, 546 F.2d 1018, 1026-1030 (1977).

In *Johnson* v. *Railway Express Co., supra*, this Court stressed that § 1981 "on its face relates primarily to racial discrimination in the making and enforcing of contracts." 421 U.S. at 459. This is such a case. There is no need to determine the meaning of the "equal benefit"

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[25] It is important to recognize that, unlike the Fourteenth Amendment, § 1981 and the Thirteenth Amendment are fully applicable to actions taken by private persons. None of the reasons for adopting the intent requirement for Fourteenth Amendment claims apply to challenges to the actions of private persons. It would certainly be an undesirable result to have different rules as to the meaning of the Thirteenth Amendment depending on the nature of the defendant, and this militates against a reflexive application of the *Washington* v. *Davis* Fourteenth Amendment standard to this case.

clause because 42 U.S.C. § 1988 provides the mechanism by which to answer the narrow question presented.

As this Court said in *Moor* v. *County of Alameda*, 411 U.S. 693, 702 (1973), "[i]nevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action." The Reconstruction Congress anticipated this and enacted what is now § 1988 as part of the Civil Rights Act of 1866.[26]

In pertinent part, § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, *so far as such laws are suitable to carry the same into effect*; but in all cases where they are *not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies* and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent

[26] Section 1988 was enacted as part of § 3 of the Civil Rights Act of 1866, 14 Stat. 27. Section 1 of that Act was the source of §§ 1981 and 1982. As explained in *Moor*:

> The initial portion of § 3 of the Act established federal jurisdiction to hear among other things, civil actions brought to enforce § 1. Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient. Considered in context, this latter portion of § 3, which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act, including § 1. *Moor* v. *County of Alameda*, 411 U.S. at 704-705.

> with the Constitution and laws of the United States, shall be extended to and govern the said courts *in the trial and disposition of the cause*, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. [Emphasis supplied.]

This section is intended to "complement the various acts which . . . create federal causes of action for the violation of civil rights." *Moor* v. *County of Alameda*, 411 U.S. at 702. It uses sweeping language. "It reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes." *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir. 1961), *cert. denied*, 368 U.S. 921 (1961).

In order to vindicate the rights conferred by the Civil Rights Acts, § 1988 directs that the jurisdiction of the Federal courts "shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect." Title VII is such a law. In *Johnson* v. *Railway Express Agency, supra*, the Court said:

> that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.

421 U.S. at 459, quoting H.Rep. No. 92-238 at 19 (1971). This Court also held, in *Griggs* v. *Duke Power Co., supra*, that Congress has made plain its intention, in the statutory language of Title VII, that it is the consequences of employment practices, and not motivation, which the Act is intended to eliminate. We have argued that a similar intent on the part of Congress is manifest in the language of § 1981. But to the extent that there is any doubt, there is no reason why § 1988 should not perform the task which Congress specifically assigned to it: to

fill in the interstices of the Civil Rights statutes with current federal law insofar as "such laws are suitable" to carry them into effect. 42 U.S.C. § 1988. *Cf. Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474 (4th Cir. 1978) (dictum), *cert. filed*, 47 U.S.L.W. 3153 (1978).

Although most cases to have come before the courts have involved the importation of remedial or procedural rules from State law when the Civil Rights statutes are silent, *see, e.g., Robertson* v. *Wegmann*, 56 L.Ed.2d 554 (1978); *Jones* v. *Hildebrant*, 432 U.S. 183 (1977), it is clear that § 1988 is not so limited. This is clear from the statutory language, stated in the disjunctive, that State law may be referred to where the laws of the United States "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies. . . ." The "object" referred to is plainly the vindication of civil rights. *Robertson* v. *Wegmann*, 56 L.Ed.2d at 564 (Mr. Justice Blackmun, dissenting).

In *Washington* v. *Davis*, *supra*, this Court stated that extension of the Title VII disparate-impact rule "beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription." 426 U.S. at 248. Application of the rule to § 1981 employment discrimination causes of action through the application of § 1988 would be fully consistent with that principle.

Additional support for the use of § 1988 is found in *Johnson* v. *Railway Express Co.*, *supra*, where the Court said that, in view of the fact that Congress had created two independent remedies against discrimination in employment on the basis of race, it was disinclined to "infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted . . .". 421 U.S. at 461. Plainly, it would show a preference for one remedy over the other if intent were required to be proven under § 1981 but not under Title VII.

In fact, there is strong evidence that Congress looked to § 1981 to afford greater protection than was available to employees under Title VII. In passing the Equal Employment Opportunity Act of 1972, Congress refused to amend Title VII to make it the exclusive remedy for employment discrimination. 118 Cong. Rec. 3173 (1972). As the debates show, Congress believed that § 1981 reaches discrimination not within the reach of Title VII and that it desired to preserve § 1981 as an independent remedy for the sake of the difference in coverage. *See* 118 Cong. Rec. 3370, 3962-63 (1972) (remarks of Sen. Javits); 118 Cong. Rec. 3372, 3964 (1972) (remarks of Sen. Williams, floor manager of S. 2515). As explained by Sen. Javits, the necessity of having to make a number of political compromises to gain passage of Title VII in 1964 had weakened it, and other remedies, including § 1981, were necessary to fill the gaps. 118 Cong. Rec. at 3962-63.

CONCLUSION

For the foregoing reasons, *amicus* submits that the writ of certiorari be dismissed as improvidently granted but that, if the Court reaches the merits, the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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